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Attorneys for Janet E. Bird & Kurt W. Bird

BEFORE THE IDAHO DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO

IN THE MATTER OF PERMIT TO
APPROPRIATE WATER NO. 74-16187
IN THE NAME OF KURT W. BIRD and
JANET E. BIRD

**MOTION TO STRIKE IWRB'S & IDFG'S
RESPONSE TO APPLICANT'S PETITION
FOR RECONSIDERATION AND
MEMORANDUM IN SUPPORT**

Applicants Kurt W. Bird and Janet E. Bird (hereinafter collectively "Bird" or the "Applicant"), by and through their attorneys of record, Holden, Kidwell, Hahn & Crapo, P.L.L.C., hereby files this *Motion to Strike IWRB's & IDFG's Response to Applicant's Petition for Reconsideration*. This motion is filed in response to the *IWRB's & IDFG's Joint Response to Applicant's Petition for Reconsideration* filed on January 31, 2020 (the "Response"). The Response was filed in response to *Applicant's Petition for Reconsideration* filed on January 23, 2020.

IDAPA 37.01.01 "contains the rules of procedure that govern the contested case proceedings before the Department of Water Resources and Water Resource Board of the state of

Idaho.” Rule 001.02.¹ Application for Permit No. 74-16187 (hereinafter simply “74-16187”) is a contested case before the Idaho Department of Water Resources (“IDWR” or “Department”). Idaho Code § 67-5243 and Rule 730 allows parties to a contested case fourteen (14) days after the service date of a preliminary order to file a petition for reconsideration. *Applicant’s Petition for Reconsideration* was filed within this timeframe. *See also* Idaho Rules of Civil Procedure 11.2(b) (“A motion to reconsider any order of the trial court entered before final judgment may be made at any time prior to or within 14 days after the entry of a final judgment.”).

Upon receiving a timely filed petition for reconsideration, “[t]he hearing officer issuing this order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See Section 67-5243(3), Idaho Code.” Rule 730.02.a.

There is no rule that authorizes or allows opposing parties to file a response to a petition for reconsideration, and therefore, the Response is improper and should be stricken. Bird’s motion to strike is filed pursuant to the Rules of Procedure of the Idaho Department of Water Resources (IDAPA 37.01.01), specifically, Rule 260.

Hearing Officer Mathew Weaver and Director Gary Spackman have already ruled on the precise issue of whether responses to petitions for reconsideration are to be considered. First, Hearing Officer Weaver:

On April 23, 2019, the city of Boise filed *City of Boise’s Response to Elmore County’s Petition for Reconsideration/ Petition for Clarification*. On April 30, 2019, the Boise Project Board of Control filed *Boise Project Board of Control’s Response to Elmore County’s Petition for Reconsideration/Petition for Clarification*. **Because the Idaho Department of Water Resources’**

¹ Citations to rules in IDAPA 37.01.01 hereafter only include the specific subsections for these rules and do not include IDAPA 37.01.01 before the subsection citation.

(“Department”) Rules of Procedure (IDAPA 37.01.01) do not authorize responses to petitions for reconsideration, the responses will not be considered.

Order on Reconsideration; Amended Preliminary Order Approving Permit Upon Conditions, In the Matter of Application for Permit 63-34348 in the Name of Elmore County, Board of County Commissioners at 1, fn. 1 (emphasis added), available at <https://idwr.idaho.gov/files/legal/elmore-county/Elmore-County-20190507-Order-on-Reconsideration-Amended-Preliminary-Order.pdf>.²

Second, Director Gary Spackman:

On April 23, 2019, the city of Boise filed *City of Boise’s Response to Elmore County’s Petition for Reconsideration/ Petition for Clarification*. On April 30, 2019, the Boise Project Board of Control filed *Boise Project Board of Control’s Response to Elmore County’s Petition for Reconsideration/Petition for Clarification*. **Because the Idaho Department’s Rules of Rules of Procedure do not authorize responses to petitions for reconsideration, the responses were not considered by the hearing officer, an outcome with which the Director agrees. See generally, IDAPA 37.01.01.**

Order on Exceptions; Final Order, In the Matter of Application for Permit 63-34348 in the Name of Elmore County, Board of County Commissioners at 1, fn. 6 (emphasis added), available at <https://idwr.idaho.gov/files/legal/elmore-county/Elmore-County-20190813-Final-Order-on-Exceptions.pdf>.

Because responses to petition for reconsideration are not allowed, the Response must be stricken. At a minimum, if this motion to strike is not granted, the contents of the Response should not be considered by the hearing officer in his consideration of *Applicant’s Petition for Reconsideration*.

Oral argument on this motion is not requested.

² The Response does not cite to any rule or other legal authority that permits filing of responses to petitions for reconsideration under IDAPA 37.01.01.

DATED this 4th day of February, 2020.



Robert L. Harris, Esq.

HOLDEN, KIDWELL, HAHN & CRAPO, P.L.L.C.

CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 2020, I served a true and correct copy of the following described pleading or document on the attorneys and/or individuals listed below by the method(s) indicated.

DOCUMENT SERVED: MOTION TO STRIKE IWRB'S & IDFG'S RESPONSE TO APPLICANT'S PETITION FOR RECONSIDERATION AND MEMORANDUM IN SUPPORT

ORIGINAL TO: **James Cefalo**
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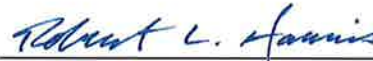
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